IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING
[Chapter VIII, Rule 32(2) (b)]
Description of Case

First Appeal No. 75 of 2001 **Decided on: August 28, 2006**

A.F.R. (Approved for Reporting)
Not Approved for Reporting

Date. 28.08.2006

(Initials of Judge)

Note: Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

Reserved Judgment

IN THE HIGH COURT OF UTTARAANCHAL AT NAINITAL

First Appeal No. 75 of 2001
(Old No. 569 of 1988)

1. Sarnu S/o Sri Hansaru.

2. Smt. Sauli W/o Sarnu
Both R/o Village Moliya,
Pati Upli Ramoli,
District Tehri Garhwal.

……. Defendants/ Appellants

Versus

1. Fagania S/o Kitlu
2. Chebatiya S/o Kitlu
3. Maliya S/o Kitlu

4. Jabru (Since Deceased)
4/1. Basant Lal S/o Jabru
4/2. Smt. Dilma W/o Jabru
Respondent Nos. 4/1 & 4/2
Both R/o Village Moliya,
Patti Upli Ramoli,
Distt. Tehri Garhwal.

5. Khunku S/o Thepru
Respondent Nos. 1, 2, 3 & 5
All R/o Village Moliya, Patti Upli Ramoli,
District Tehri Garhwal.

…….. Plaintiffs/ Respondents

Mr. Rajendra Dobhal, learned counsel for the defendants / appellants.
Mr. U.K. Uniyal, Senior Counsel with Mr. Alok Mehra, counsel for the plaintiffs / respondents.

Hon'ble Prafulla C. Pant, J.

This appeal, preferred under Section 96 of the Code of Civil Procedure, 1908, is directed against the judgment

and decree dated 09.05.1988, passed in Original Suit No. 08 of 1986, by the learned District Judge, Tehri Garhwal, whereby said suit is decreed with costs for perpetual injunction against the defendants (appellants) restraining them from crating any obstruction over land in dispute against the right of plaintiffs (respondents) to use it as a pathway. The trial court has further decreed the suit for Rs. 3,000/- as damages.

2) Heard learned counsel for the parties and perused the entire record.

3) As per the plaint case, the plaintiffs are residents of village Moliya, Patti Upli Ramoli, District Tehri Gahrwal. From the period of their ancestors it is alleged that they were using the plot No. 1356 situated in Semalhari Tok, owned by the defendants No. 1 and 2 as pathway for reaching to the plots owned by them (plaintiffs). It is further pleaded by the plaintiffs that they were using said land in that manner for over fifty years, openly and as of right. Claiming the easementary right, it is alleged by the plaintiffs that on 21.02.1983 they were obstructed by the defendants No. 2 in their user of the above plot as pathway, and thereafter, raised a wall obstructing the pathway. The wall was removed on 06.03.1983 but pathway was again closed by the defendants No. 1 and 2. On this , the proceedings under Section 147 of the Code for Criminal Procedure, 1973 (hereinafter referred as Cr.P.C.) were imitated against defendants No. 1 and 2, before the Sub Divisional Magistrate, Tehri, in which an order was passed in favour of the plaintiffs directing defendants No. 1 and 2

to remove the obstruction, till the rights are determined from a competent court. It is further pleaded in the plaint that to save themselves from the order of the Magistrate defendants Nos. 1 and 2 instituted a suit No. 54 of 1983 against the plaintiffs / respondents seeking permanent injunction, but said suit was later on withdawn by the defendants. By amending the plaint, it is further pleaded that against the defendants No. 1 and 2 raised the wall and there was another round of litigation before the criminal court. With these allegations, suit No. 08 of 1986 was field by the plaintiffs on 06.2.1986 alleging that the cause of action has arisen to them on 22.02.1983. When wall was raised by defendants No. 1 and 2 over their plot No. 1356 preventing thereby plaintiffs to use it as passage to their fields.

4) Defendants No. 1 and 2 contested the suit and filed the written statement denying the easementary rights claimed by the plaintiffs. It is pleaded in the written statement that the plaintiffs have a separate way to reach to their plots. It is further pleaded in the written statement that the plaintiffs forcibly want to use the defendants' plot No. 1356, as a pathway to reach their fields. As to the proceedings under Section 147 Cr.P.C., the allegations contained in the plaint are admitted by the answering defendants.

5) Learned trial court on the basis of the pleadings of the parties, framed following issues:

1. ***Whether, the plaintiffs have a right of way through plot No. 1356, as claimed in the plaint?***
2. ***Is the suit barred by time as alleged in para 17 of the written statement?***
3. ***Whether, the defendants are estopped from denying plaintiffs' right of way and passage, as alleged in para 5 for the emended plaint?***
4. ***Whether, the plaintiffs have been deprived of six crops on account of the defendants action and have they suffered loss of Rs. 6,000/-, as alleged?***
5. ***To what relief, if any, the plaintiffs are entitled?***

6) After recording the evidence and hearing the parties, the trail court found that the plaintiffs have been successful in proving easementary right acquired by prescription over plot No. 1356 of the defendants No. 1 and 2. It further found that the neither the plaintiffs' suit is barred by time nor the defendants are estopped from denying right claimed by the plaintiffs? As to the damages it found that the plaintiffs are entitled to Rs. 3,000/- from the defendants No. 1 and 2, and accordingly, the trial court vide its judgment and decree dated 09.5.1988, decreed the suit for perpetual injunction restraining defendants No. 1 and 2 from making any obstruction over plot No. 1356 used as passage by the plaintiffs and for damages to the tune of Rs. 3,000/- from said defendants (However, impugned decree is silent as to the relief of mandatory injunction for removal of obstruction from the defendants' plot). Aggrieved by which, this Appeal was preferred by the defendants No. 1

and 2 before the Allahabad High Court in the year 1988, from where it is received by transfer to this Court, under Section 35 of the U.P. Re-organization Act, 2000, for its disposal.

7) Before further discussions, it is pertinent to mention here, the relevant provision of law applicable to this case. Section 15 for the Indian Easements Act, 1882, which relates to acquisition of easement by prescription, provides as under:

> ***"15. Acquisition by prescription.*** *- …… …… and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years,*
>
> *the right, to such access and use of light or air, support, or other easement, shall be absolute.*
>
> *Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.*
>
> ……"

8) From the above provision, it is clear that to claim a right of easement by prescription, the plaintiffs must plead and establish, following conditions:

i) a pre-existing easement having being enjoyed by the dominate owner,

ii) peaceably,

iii) as an easement,

iv) as of right,

v) openly,

vi) for twenty years, and

vii) without interruption,

9) In the present case, plaintiff' (respondents) in their para 2 for the plaint have pleaded that they were using land of plot No. 1356, openly, as of right, without interruption, for a period of fifty years. However, there is no pleading that the plot of the defendants No. 1 and 2 was being used as passage peaceably. Assuming for a moment, that *'peaceably'* is covered from the pleadings contained in the plaint, there is no evidence of said fact adduced on behalf of the plaintiffs. The plaintiffs got examined P.W. 1 Doma (plaintiff / respondent), P.W. 2 Vijay Singh and P.W.3 Kirti Singh. All the three witnesses examined on behalf of the plaintiffs have stated that the plaintiffs have a passage through the defendants' plot since the period of their ancestors. None of these witnesses have stated that the plaintiffs used the plot of the contesting defendants as passage peaceably. As such, it cannot be said that it is established on the record that the alleged easement was being enjoyed peaceably. Particularly in the circumstances, that admittedly, from February 1983, there was continuous litigation, either in the criminal court or in the civil court, arising out of the alleged right to use the plot No. 1356 as passage by the plaintiffs. Therefore, this Court is unable to find itself in agreement with the trial court that the plaintiffs have successfully proved easementary right of passage by way of prescription over plot No. 1356. it is

pertinent to mention here that plot No. 1356 is neither adjoining to the plaintiffs house nor to their fields, as is clear from the plaint map itself, and also from the map (Ext. A -2) filed by the defendants. In the circumstances, it cannot be said that the plaintiffs have successfully proved easementary right of their passage over the plot No. 1356.

10) On examination of the evidence or record, and after hearing the arguments of the parties before this Court, it is found that the trail court has taken an erroneous view that the intervening period of two years between the date when the obstruction was made and the date of institution of suit, which is more than two years, does not affect the suit. From the relevant provision contained in Section 15, as quoted above, it is clear that the "period of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates, is contested." From the pleadings contained in the plaint, it is clear that admittedly, on 21.02.1983 and 22.02.1983, defendants No. 1 and 2 (present appellants) objected and by raising wall refused to permit the plaintiffs (respondents) to pass through plot No. 1356. the plaint is presented before the trial court on 06.02.1986. As such, the period between 22.12.1983 and 06.02.1986 is more than two years, rather, almost three years. As such the period of user, even after more than twenty years, if stands expired before two years of institution of suit due to the obstructions raised by the defendants No. 1 and 2, it cannot be said that the plaintiffs are entitled to the relief claimed on the basis of the right of easement pleaded by them, by way of prescription. It is

pertinent to mention here that in the suit not only relief of perpetual injunction is sought but also mandatory injunction is sought for removal of wall raised by the defendants.

11) For the reasons as discussed above, in the opinion of this Court, the appeal deserves to be allowed. The impugned judgment and decree passed by the trial court is liable to be set aside, and the suit No. 08 of 1986 is also liable to be dismissed. Accordingly, the appeal is allowed. Impugned judgment and decree dated 09.05.1988, passed in Original Suit No. 08 of 1986 is set aside. The suit is dismissed. Costs easy.

(Prafulla C. Pant, J.)

Dt. 28th August, 2006.
H.Negi